AHMAD SHAH BIN HASHIM v. PUBLIC PROSECUTOR

[F.C. (Raja Azlan Shah Ag. L.P., Chang Min Tat & Syed Othman F.JJ.) September 17 & October 26, 1979]
[Kuala Lumpur — Federal Court Criminal Appeal No. 18 of 1978]

Criminal Law and Procedure — Bribery and Corruption — Ingredients to be proved — Whether accused an officer of a public body — Retired officer no longer agent of Government — Police Statement containing allegations against another officer and contradicting evidence of prosecution — Court can accept part of statement and reject rest — Accomplice — Sentence — Public interest — Criminal Procedure Code, F.M.S. (Cap. 6), ss. 112 & 113 — Prevention of Corruption Act, 1961, ss. 2 & 3.

Evidence — Corruption — Accomplice evidence — Burden of proof.

Bribery and Corruption — Evidence — Accomplice evidence — Prevention of Corruption Act, 1961, ss. 2 & 3.

Criminal Law and Procedure — Appeal — Question of fact — Charge of soliciting for illegal gratification — Offence committed even if illegal gratification solicited for another — Prevention of Corruption Act, (Act 57), ss. 4 & 13.

In this case the accused who was an Air Force Officer was charged with corruption in relation to a recommendation to the Government to purchase a certain type of aircraft. The accused alleged that although he solicited the amounts alleged he did so at the request and on behalf of another air force officer. In his statement to the police which was put in by the prosecution the accused mentioned the allegations against the other officer. The person alleged to have given the bribes gave evidence for the prosecution.

The High Court held: (1) on the facts, the defence had not raised any reasonable doubt in the prosecution case and therefore the accused must be convicted;

(2) although the statement of the accused, to the police was put in by the prosecution and contained allegations which seem to contradict the evidence led by the prosecution, the court was entitled to assess the evidence and in so doing accept part of the statement and reject the rest;

(3) although the person who gave the bribes was an accomplice, it was the accused who solicited the bribe, and therefore that person could not be classified as an accomplice of the first degree, and in any event there was corroboration by documentary and circumstantial evidence.

On appeal to the Federal Court,

Held: (1) as the finding of the trial court depended on an assessment of the credibility and reliability of the witness, it is not the practice of the court sitting on appeal to refuse to accept it;

(2) there was no reason to disturb the High Court's findings of fact or the conviction and sentence.

Case referred to:-

(1) *Lim Yow Choon* v. *Public Prosecutor* [1972] 1 M.L.J. 205.

HIGH COURT.

Faidz Mohamad Darus (Deputy Public Prosecutor) for the Public Prosecutor.

Sulaiman Alias for the accused.

P. Rajan watching brief for Northrop Corporation of U.S.A.

V.C. George watching brief for directors of Syarikat Bumiputra Sdn. Bhd.

Cur. Adv. Vult.

Mohamed Azmi J.: The accused was originally charged on May 3, 1978 at the instance of the Public Prosecutor on five counts under the Prevention of Corruption Act, 1961 (Laws of Malaysia Act 57) in the following terms:—

"First Charge:

That you on or about the 24th November, 1971 in your office in the Ministry of Defence, Jalan Padang Tembak at Kuala Lumpur, then in the State of Selangor, did corruptly solicit for yourself a gratification, to wit 1 percent, representing one-third of the 3 percent commission due to Syarikat Bumiputra Sdn. Bhd. from Northrop Corporation, U.S.A. to be calculated on the basis of the sale price actually and directly paid to Northrop Corporation for the sale of Northrop F-5 type aircraft to the Government of Malaysia, from the said Syarikat Bumiputra Sdn. Bhd. as an inducement to you being an officer of a public body, namely, the Government of Malaysia, to recommend to the said Government of Malaysia to purchase Northrop F-5 type aircraft for the Royal Malaysian Air Force, and that you thereby committed an offence punishable under section 3(a)(ii) of the Prevention of Corruption Act, 1961 (Laws of Malaysia Act 57).

Second Charge:

That you on or about the 19th day of February, 1973 at No. 41, Lorong Bandar Tiga, Old Klang Road in the Federal Territory of Kuala Lumpur, being an agent of the Government of Malaysia, namely Group Captain of the Royal Malaysian Air Force, did corruptly accept for yourself a gratification, to wit, $8,500 from Syarikat Bumiputra Sdn. Bhd., Kuala Lumpur as a reward for doing an act in relation to your principal's affairs, to wit, to recommend to the Government of Malaysia to purchase Northrop F-5 type aircraft for the Royal Malaysian Air Force, and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961.

Third Charge:

That you on or about the 16th day of July, 1973 at No. 41, Lorong Bandar Tiga, Old Klang Road in the Federal Territory of Kuala Lumpur, being an agent of the Government of Malaysia, namely Group Captain of the Royal Malaysian Air Force, did corruptly accept for yourself a gratification, to wit, $5,350 from Syarikat Bumiputra Sdn. Bhd., Kuala Lumpur as a reward for doing an act in relation to your principal's affairs, to wit, to recommend to the Government of Malaysia to purchase Northrop F-5 type aircraft for the Royal Malaysian Air Force, and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961.

Fourth Charge:

That you on or about the 13th day of August, 1973 at No. 41, Lorong Bandar Tiga, Old Klang Road in the Federal Territory of Kuala Lumpur, being an agent of the Government of Malaysia, namely Group Captain of the Royal Malaysian Air Force, did corruptly accept for yourself a gratification, to wit, $44,500 from Syarikat Bumiputra Sdn. Bhd., Kuala Lumpur as a reward for doing an act in relation to your principal's affairs, to wit, to recommend to the Government of Malaysia to purchase Northrop F-5 type aircraft for the Royal Malaysian Air Force, and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961.

Fifth Charge:

That you on or about the 23rd day of March, 1974 at No. 41, Lorong Bandar Tiga, Old Klang Road in the Federal Territory of Kuala Lumpur, being an agent of the Government of Malaysia, namely Group Captain of the Royal Malaysian Air Force, did corruptly accept for yourself a gratification, to wit, $43,800 from Syarikat Bumiputra Sdn. Bhd., Kuala Lumpur as a reward for doing an act in relation to your principal's affairs, to wit, to recommend to the Government of Malaysia to purchase Northrop F-5 type aircraft for the Royal Malaysian Air Force, and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961."

Before closing their case, the prosecution amended second to fifth charges regarding the date, place and amount of money involved.

On the second charge, the offence is alleged to have taken place on or about February 20, 1973 at

the Ministry of Defence (MINDEF), Jalan Padang Tembak, instead of February 19, 1973 at No. 41, Lorong Bandar Tiga, Old Klang Road.

On the third charge, the offence is alleged to have taken place on or about July 17, 1973 at MINDEF, Jalan Padang Tembak, instead of July 16, 1973 at No. 41, Lorong Bandar Tiga, Old Klang Road.

On the fourth charge, the offence is alleged to have taken place on August 14, 1973 at MINDEF, Jalan Padang Tembak, instead of August 13, 1973 at No. 41 Lorong Bandar Tiga, Old Klang Road, and the accused is alleged to have corruptly accepted for himself $44,000 instead of $44,500.

On the fifth charge, the offence is alleged to have taken place on March 24, 1974 instead of 23rd.

After considering submission of no case to answer by the learned defence counsel and the reply of the learned Deputy Public Prosecutor, I amended the first charge from section 3(a)(ii) to section 4(a) of the Prevention of Corruption Act, 1961 to read as follows:—

"That you between 24th and 28th November 1971 at Merlin Hotel, Kuala Lumpur, then in the State of Selangor, being an agent of the Government of Malaysia, namely, Wing Commander of the Royal Malaysian Air Force, did corruptly agree to accept for yourself a gratification, to wit, 1 percent representing one-third of the 3 percent commission due to Syarikat Bumiputra Sdn. Bhd. from Northrop Corporation U.S.A., to be calculated on the basis of the sale price actually and directly paid to Northrop Corporation for the sale of Northrop F-5 type aircraft to the Government of Malaysia, from the said Syarikat Bumiputra Sdn. Bhd., as a reward for doing an act in relation to your principal's affairs, to wit, to recommend to the Government of Malaysia to purchase Northrop F-5 type aircraft for the Royal Malaysian Air Force, and that you have thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act, 1961 (Laws of Malaysia Act 57)."

The accused is then called for his defence on the first charge as amended by court, and also on the second, third and fourth charges as amended by the prosecution. The accused is, however, acquitted and discharged on the fifth charge without his defence being called.

From the evidence adduced, the prosecution case may be summarised as follows:—

In 1969, the Royal Malaysian Air Force (RMAF) was equipped with Sabre jets which were a gift from the Australian Government. Being re-conditioned aircrafts, their life-spans were very limited. In the event, on July 8, 1971, Datuk Sulaiman Sujak (PW1), the then Chief of Air Staff of RMAF, submitted an aide memoire to the Government to evaluate four types of aircrafts, namely, the French Mirage, the British Jaguar, the American Phantom and the American Northrop F-5, for the purpose of replacing the Sabre jets. On approval of the Government, a three-man evaluation team comprising of Datuk Sulaiman, Wing Commander Shanmuganathan (PW3) — now a Lieutenant Colonel — and Wing Commander Ahmad Shah (the accused) — later promoted to Group Captain — left for the United States, France and Britain. On return to Malaysia, the evaluation team submitted to the Government a joint report on September 7, 1971 wherein the French Mirage was recommended as most suitable. The recommendation of the team was, however, turned down because of financial limitation of the Government. Instead, at the request of the Government, Datuk Sulaiman submitted a draft aide memoire on the Northrop F-5 aircrafts on November 21, 1971; and on December 24, the draft aide memoire was approved by the late Tun Abdul Razak, who was then the Prime Minister and concurrently the Minister of Defence. Subsequently, a five-man negotiation team was formed with Datuk Sulaiman as the leader. The other four members were Wing Commander Shanmuganathan, the accused, Encik Rustam Hadi, the then Deputy Secretary General of MINDEF, and Tuan Haji Othman (PW2), the then Head of Stores and Contracts Division of the Treasury. On or about May 20, 1972, the negotiation team left for the United States; and on return to Malaysia, Datuk Sulaiman together with Encik Rustam Hadi and Tuan Haji Othman put up a joint brief on June 29, 1972. To cut the story short, the late Prime Minister approved the recommendations; and on June 30, 1972, an agreement was entered into between the U.S. and the Malaysian Government regarding the purchase of the sixteen Northrop F-5 aircrafts. Now, whilst the 1971 three-man evaluation team and the five-man 1972 negotiation team were busy with their respective work, a company incorporated in 1965 known as Syarikat Bumiputra Sdn. Bhd. (hereinafter referred to as "the Syarikat") was also busy in trying to get itself appointed as agent for Northrop Corporation. Through the effort of Haji Ibrahim bin Sheikh Yahya (PW10), the Syarikat's Managing Director, the Syarikat was introduced to Mr. Robert Uhrig (PW9) of Northrop Corporation by one Mr. T.A. Lewis. Eventually, a Sales Representative Agreement (Exhibit P7B), which was subsequently amended twice, was executed in Bangkok some time in the middle of November 1971 between the Syarikat and Northrop Corporation, whereby the Syarikat was appointed as Northrop's sales representative in Malaysia. Under clause 5 of the agreement as subsequently amended, the Syarikat was to receive 3 percent commission from Northrop Corporation for all sales of F-5 type aircrafts to the Government of Malaysia, including sales of spares and ground support equipment. For services rendered by Mr. T.A. Lewis, the Syarikat agreed to give him 1 percent representing one-third of the 3 percent commission payable to the Syarikat by Northrop. After signing the agreement in Bangkok, Haji Ibrahim returned to Kuala Lumpur and went to see the accused at MINDEF on or about November 24, 1971. It was at this meeting that the prosecution allege that the accused corruptly solicited for himself 1 percent representing one-third of the 3 percent commission due to the Syarikat from Northrop Corporation as an inducement to him to recommend to the Government of Malaysia to purchase Northrop F-5 aircrafts for the RMAF. After discussing the request of the accused in an emergency informal meeting of the board of directors, the Syarikat agreed to give the 1 percent commission to the accused and his associates. On the following day, the decision of the board was conveyed to the accused at Merlin Hotel at about 5.00 p.m. At that meeting, the accused agreed to accept the bribe of 1 percent commission and promised the syarikat that he would try his best to sell the F-5 planes to the Malaysian Government. Thus, by November 28, 1971, the Syarikat had already agreed to distribute its 3 percent equally with

Mr. T.A. Lewis of Bangkok and the accused, although this decision was not formally conveyed to Northrop until May 1972. (See Exhibit P7D1 and P7D2). As to the mode of payment of the accused's share of 1 percent, the accused made an arrangement that the money be paid direct by Northrop Corporation to Swiss Bank Corporation in Zurich opened in the name of S.H. Tan (PW8) — Account No. P.O. 318 — 727. S.H. Tan is the younger brother of Chan Soo Weng (PW5), who was then the Executive Officer working directly under the accused in the Supply Branch of the Air Staff Division of MINDEF. From Zurich bank, the money would be deposited in S.H. Tan's bank account No. 111 — 14396 — 04 in the Chase Manhatten Bank, Singapore. The money would then be withdrawn by S.H. Tan and he would pass it on to accused through his brother Chan. The accused's instruction to have the money deposited in S.H. Tan's account in Zurich was conveyed by Haji Ibrahim to Northrop, and it was accordingly carried out. Altogether, four deposits were made by Northrop Corporation in S.H. Tan's account in Zurich; and through the procedure already arranged, the accused received money from Chan on four separate occasions as stated in the amended second, third, fourth and fifth charges. After that, no further deposits were made by Northrop to S.H. Tan's Swiss bank account due to instruction given by the Syarikat, and instead Northrop Corporation was instructed to remit future payments to Bank of Montreal in Los Angeles established in the name of Haji Ibrahim as managing director of the Syarikat. Thus, out of approximately U.S.$177,473 which represents 1 percent commission due to the accused, only about U.S.$43,987 had been paid by Northrop to S.H. Tan's account in Zurich. The balance of more than U.S.$133,000 was paid to the Syarikat's bank account in Los Angeles, U.S.A., and was eventually used by the Syarikat. In short, the total sum corruptly received by the accused as contained in the second to fifth charges represents only about 20 percent of the money which the accused had solicited and agreed to accept as gratification for himself. Payment to S.H. Tan's account in Zurich was stopped by the Syarikat in August 1974 (see Exhibit P7L3) because S.H. Tan could not be traced to sign the verification letter (Exhibit P7L1) sent by the financial section of Northrop Corporation, whereby S.H. Tan was requested to verify the money already paid to his account in Zurich for auditing purposes. When the accused finally turned up at the office of the Syarikat on January 5, 1975 and enquired why payment had been stopped, Haji Ibrahim showed him the verification letter from Northrop which required to be signed. The accused did not sign the verification letter, but told Haji Ibrahim that he would consult his associates as to who should sign the document, and he promised to come back in two or three days' time, but he was never to be seen again until the trial of this case. Investigation by NBI started officially on April 1, 1976 when Syed Abu Bakar lodged a police report (Exhibit P47). On February 4, 1977, the investigation was handed to Mr. C. Thavarajah (PW6). The accused was arrested on September 26, 1977; and before his arrest, he made a police statement to Mr. Lee Kwan Chiew (PW11) of the NBI on April 19, 1976 (Exhibit P45).

On the first original charge under section 3(a)(ii) of the Prevention of Corruption Act, it is for the prosecution to prove, firstly, that the accused is an officer of a public body; and, secondly, the accused corruptly solicited for himself one-third of the 3 percent commission due to the Syarikat from Northrop Corporation, and, thirdly, the gratification of 1 percent commission was an inducement to the accused to recommend to the Government of Malaysia to purchase the Northrop F-5 aircrafts for the RMAF. On the first ingredient, the evidence of Datuk Sulaiman (PW1), the then Chief of Air Staff, proves conclusively that at the relevant time the accused was a Wing Commander in the RMAF holding the post of Director of Supply and Finance in the Air Staff Division of MINDEF. The post was later up-graded to Group Captain. On the second and third ingredients, the prosecution are relying heavily on the evidence of Haji Ibrahim (PW10), the 74-year old managing director of the Syarikat and also on documentary and circumstantial evidence. Haji Ibrahim has been subjected to lengthy cross-examination by defence counsel; and although he cannot be sure of many details, particularly dates of various events that took place more than five years ago, it is my finding that he is a truthful witness. I accept his evidence that on November 24, 1971 on his return from Bangkok where he had signed the Sales Representative Agreement with Northrop Corporation, he went to see the accused at MINDEF. At that meeting, he informed the accused that the Syarikat had been appointed as Northrop's sales representative and asked the accused whether he could help to sell the F-5 planes to the Malaysian Government. After saying that he was only a Wing Commander, and that there were other superior officers whom he had to see and discuss, the accused asked how much commission he would receive if he were to discuss the matter with his superior officers. When the accused was informed that the Syarikat only received 3 percent from Northrop and had only a balance of 2 percent — since 1 percent had already been assigned to Mr. T.A. Lewis — the accused enquired whether the Syarikat would give 1 percent commission if he and his colleagues were to help to sell the planes. Haji Ibrahim replied that he had to get the decision of the board of directors on the matter. I accept Haji Ibrahim's evidence that there was an informal board of directors meeting to discuss the request of the accused on November 27, 1971, although no minutes were recorded as the matter involved a Government officer. It should be noted, however, that a formal resolution regarding distribution of the 3 percent commission was in fact passed by the board of directors on May 22, 1972 (see Exhibit P32). It can reasonably be inferred that this was due to the fact that the method of payment of the bribe was only disclosed to Haji Ibrahim by the accused after S.H. Tan had established his Swiss bank account some time in May 1972. This is consistent with the letter sent by Haji Ibrahim to Mr. Uhrig dated May 25, 1972 (see Exhibit P7D2). After the board had given its approval of the 1 percent commission to the accused and his associates on November 27, 1971, Haji Ibrahim conveyed the board's decision to the accused at Merlin Hotel on November 28, 1971 at about 5.00 p.m. The accused thanked Haji Ibrahim and agreed to accept the 1 percent commis-

sion, and he also promised that he would try his best to sell the planes to the Government. Although Haji Ibrahim appears to be unsure of the date of the informal board meeting, and also the date of the meeting with the accused at Merlin Hotel, I am satisfied from the evidence as a whole, that the accused did solicit for the 1 percent commission on November 24, 1971 at MINDEF, and did some time between November 24 and November 28, 1971 agree to accept 1 percent commission from the Syarikat at Merlin Hotel. In my view, Haji Ibrahim's evidence regarding the soliciting at MINDEF and the agreement to accept the bribe at Merlin Hotel is corroborated by subsequent events. It should be observed that the first charge is interconnected with the second, third, fourth and fifth charges which I will deal later. Suffice for me to say at this stage that the facts that the soliciting and subsequent agreement to accept for himself the 1 percent commission were done corruptly are supported by the manner in which the gratification was to be paid. The action of the accused in arranging for the Swiss bank account to be established in the name of S.H. Tan, as evidenced by the testimony of Chan, S.H. Tan himself and documentary exhibits, clearly establish guilty intention on the part of the accused. It is also not seriously challenged that it was the accused who supplied the particulars of the Swiss bank account to Haji Ibrahim with the name of S.H. Tan, and Haji Ibrahim in turn instructed Northrop Corporation to remit 1 percent of the commission due to the Syarikat direct to S.H. Tan's Swiss bank account. This is confirmed in the first amendment to the Sales Representative Agreement between the Syarikat and Northrop Corporation (Exhibit P7E), and also in the second amendment to the said agreement (Exhibit P7E2) which extended the payment of commission by Northrop not only to F-5E aircrafts but also to all types of F-5 aircrafts.

However, on the third ingredient, I agree with the submission of learned defence counsel that the prosecution have failed to prove that as on November 24, 1971, the accused recommended to the Government of Malaysia to purchase the Northrop aircrafts for the RMAF. It is clear from the evidence that as on that date the three-man evaluation team, of which the accused was a member, had already submitted its joint report recommending the purchase of the French Mirage in preference to Northrop F-5, Phantom and Jaguar. According to the evidence of Datuk Sulaiman, the evaluation team report was submitted on September 7, 1971. But because of financial limitation, the team's recommendation was not accepted; and at the request of the Government, Datuk Sulaiman, the then Chief of Air Staff, submitted an aide memoire on F-5 type aircraft on December 14, 1971. It is conceded by the learned D.P.P. that between September 7, 1971 and December 14, 1971, the position was still fluid, in the sense that the Government had not decidedly made a choice as to the particular type of aircraft. Although the accused was a member of the five-man negotiation team which visited U.S.A. in May 1972 in connection with the F-5 type aircraft, the joint brief on the negotiation was put up by Datuk Sulaiman, Tuan Haji Othman Malek and Encik Rustam Hadi. The brief recommended the purchase of sixteen F-5 type aircrafts comprising of fourteen F-5E model and two F-5B model at the cost of about U.S. $39 million. The brief also recommended that the purchase should be on Government to Government basis and that the credit offered by the U.S. Government to Malaysia be accepted. Thus, although the accused was jointly responsible for putting up the evaluation team report which recommended the Mirage, he had nothing to do with the joint brief put up by the three officials on F-5 type aircrafts. Indeed, both Datuk Sulaiman (PW1) and Lt. Col. Shanmuganathan (PW3) concede in cross-examination that the accused could not have recommended to the Government of Malaysia to purchase F-5 type aircrafts. Under the circumstances, I amended the first charge to section 4(a) of the Prevention of Corruption Act which, by virtue of section 6, makes the issue of whether the accused in fact had the power to recommend to the Government irrelevant. In this case, I accept the evidence of Haji Ibrahim that at the Merlin Hotel meeting, the accused did agree to accept the 1 percent commission and did promise to sell the F-5 planes to the Government. Coupled with the evidence of soliciting the commission at the meeting at accused's office at MINDEF, I am satisfied a *prima facie* case has been established from the prosecution evidence that between November 24 and November 28, 1971, the accused was an agent of the Government of Malaysia, and that at Merlin Hotel, Kuala Lumpur, he did corruptly agree to accept for himself 1 percent representing one-third of the 3 percent commission due to the Syarikat as a reward for recommending to the Malaysian Government to purchase F-5 type aircrafts for RMAF. The accused pleaded not guilty to the first amended charge, and he was accordingly called to enter his defence.

As regards the amended second, third, fourth and fifth charges, it is for the prosecution to prove that, firstly, the accused was an agent of the Government at the relevant times. Secondly, he corruptly accepted for himself the various sums of money as stated in the amended charges; and, thirdly, he agreed to accept this gratification as a reward for doing an act in relation to the affairs of the Malaysian Government, namely, to recommend to the Government of Malaysia to purchase Northrop F-5 type aircraft for RMAF. On the first ingredient, except for the amended fifth charge, it has been established beyond reasonable doubt that the accused was an agent of the Government of Malaysia, namely, Group Captain, at the relevant dates as stated in the amended second, third and fourth charges. With regard to the second ingredient, I accept the evidence of the retired Executive Officer, Chan (PW5), that some time in early 1972, the accused who was then his boss approached him and enquired whether he knew of anyone with overseas bank account for the purpose of collecting money for top people. According to Chan, it was the accused who requested for a Swiss bank account. It should be noted that by this time, i.e. by January or February 1972, the accused had already agreed to accept the 1 percent commission from the Syarikat in November 1971 as stated in the amended first charge. It can reasonably be inferred that it must have taken the accused some time to get somebody trustworthy to open a bank account in Switzerland for the collection of the bribe; and it is not unreason-

able to infer that it took him a few months before deciding to approach his Executive Officer Chan. Further, according to the evidence of Chan, it took him some time to persuade his businessman younger brother S.H. Tan to agree to the accused's request; and it was not until May 1972 that S.H. Tan established the necessary bank account in Zurich. Whilst he was still in Europe, S.H. Tan sent a telegram to his elder brother Chan informing him of the particulars of the Swiss bank account; and Chan, in turn, passed the message to the accused; and according to the evidence of Haji Ibrahim, it was some time in May 1972 at Fortuna Hotel, Kuala Lumpur, that the accused gave him a chit containing particulars of the Swiss bank account into which the bribe was to be paid. In my view, this particular piece of evidence is supported by the action of Haji Ibrahim in forwarding the particulars of the Swiss bank together with S.H. Tan's name to Northrop Corporation as contained in his letters dated May 12, 1972 and May 25, 1972 (Exhibit P7D1 and Exhibit P7D2) and also by the two amendments to the Sales Representative Agreement (Exhibit P7E1 and Exhibit P7E2). From documentary exhibits, particularly Exhibit P7L7 or Exhibit P44, a total of U.S.$43,987 was paid by Northrop Corporation into S.H. Tan's account in Zurich. From the evidence of S.H. Tan and Chua Choon Kim (PW7), the Assistant Manager of Chase Manhatten Bank in Singapore, a bank draft from Swiss Bank Corporation Zurich was deposited into S.H. Tan's account in the Singapore bank on four separate occasions. From the evidence, I am satisfied that S.H. Tan received bank draft from the Swiss bank on four occasions, and on each occasion, he deposited it into the Singapore bank; and he also made withdrawals from the Singapore bank on four separate occasions. This is supported by Exhibits P11 and P12 in respect of the second amended charge; by Exhibits P13, P14 and P15 in respect of the amended third charge; by Exhibits P16, P17 and P18 in respect of the amended fourth charge; and by Exhibits P19, P20 and P21 in respect of the amended fifth charge. On each of these four withdrawals, S.H. Tan handed the money to his elder brother Chan in a sealed envelope at Ampang Complex car-park and Chan, in turn, passed it to the accused. From the evidence of the two brothers, I am satisfied that the accused did corruptly receive for himself $8,500 on February 20, 1973; $5,350 on July 17, 1973; $44,000 on August 24, 1973; and $43,800 on March 24, 1974. The fact that S.H. Tan had deducted $500 on each trip to Singapore for the withdrawal of the money is irrelevant, because these deductions are not included in the four amended charges. To my mind, it is reasonable for S.H. Tan to have deducted the $500 as his expenses. Although Chan (PW5) is now suffering from a heart condition, he has not been shaken in any way in cross-examination; and I am satisfied that he did hand over the four sealed envelopes containing money to the accused on the four dates as stated in the amended charges. As regards the third ingredient, I accept the evidence that these monies were corruptly accepted by the accused as part payment of 1 percent commission which he had agreed to accept between November 24 and November 28, 1971 at Merlin Hotel, which is the subject-matter of the amended first charge. From Haji Ibrahim's evidence, this gratification was given to the accused as a reward for the accused to recommend to the Government of Malaysia to purchase the F-5 planes for the RMAF. By virtue of section 6 of the Prevention of Corruption Act, where an agent has corruptly accepted for himself gratification as a reward for doing any act in relation to his principal's affairs, he is guilty of the offence under section 4(a), notwithstanding that he had no power or opportunity to make such recommendation. In the circumstances, I find there is a *prima facie* case to answer in respect of the amended second, third and fourth charges. I therefore called for the accused to enter his defence on these charges.

But in respect of the fifth charge, although there is ample evidence that the accused had received corruptly for himself $43,800 on March 24, 1974, the prosecution have failed to prove that he was an agent of the Government of Malaysia at the material time. I agree with defence counsel's submission that, on the date of the alleged offence, i.e. March 24, 1974, the accused had already retired from the RMAF. According to prosecution evidence, the accused retired on September 10, 1973. As such, I am of the view that he could not be an "agent" of the Government of Malaysia at the relevant time within the ambit of the definition in section 2 of the Act. Nor can he be said to be "in the employment of any public body" within the meaning of section 14. I have considered the suggestion of the learned Deputy Public Prosecutor to have the charge amended to section 3(a)(i) of the Act. To my mind, the proposed amendment cannot stand due to the same reasons.

At the close of case for the prosecution, I am well aware that the police statement made by the accused before his arrest (Exhibit P45) contains allegation against Datuk Mohamed Taib (PW4) which seems to contradict the evidence led by the prosecution. In *Lim Yow Choon* v. *Public Prosecutor*,[1] it was held by the Federal Court, firstly, that the cautioned statement produced by the prosecution must be regarded as forming part of the case for the prosecution; and, secondly, notwithstanding that the cautioned statement was part of the evidence for the prosecution and that there were facts in the cautioned statement which appeared to contradict other parts of the evidence led by the prosecution, it was open to the trial judge as a judge of facts, to assess the evidence and in so doing accept part of it and reject the rest. In my view, the same law should apply in a case of statements made by an accused person before his arrest under section 112 of the Criminal Procedure Code and made admissible under section 113 as amended, and also made admissible under section 15 of the Prevention of Corruption Act. In this case, I have considered the allegation made by the accused in the statement against Datuk Mohamed Taib to the effect that it was he who had requested the accused to solicit for the 1 percent commission. Datuk Mohamed Taib has given evidence that he had nothing to do with the purchase of Northrop F-5 aircrafts; and when recalled by the prosecution, he also testified that he was not responsible for the accused soliciting 1 percent commission from the Syarikat. He further said that he never received any of the monies as stated in the second, third, fourth and fifth charges. Finally,

he also said that, if anyone were to say that he was involved in soliciting the 1 percent or if someone were to say that he accepted any of the money, he would call that person a liar. Having considered his evidence and the fact that Datuk Mohamed Taib was never cross-examined on this particular evidence, it is my finding at the close of case for the prosecution that the allegation made by the accused has no real basis whatsoever. Although the police statement of the accused was produced after Datuk Mohamed Taib had been recalled by the prosecution, he was never recalled by the defence for further cross-examination until after the accused had given his evidence.

In the event, I call the accused to enter his defence on the first charge as amended by the court, and also on the second, third and fourth charges as amended by the Deputy Public Prosecutor. The accused is, however, acquitted and discharged on the amended fifth charge without his defence being called.

In his defence, the accused elects to give evidence on oath. He also calls his wife as a witness. On the first amended charge, it is the contention of the defence that the accused did not agree to accept the gratification for himself. He only acted as a courier for Datuk Mohamed Taib. Secondly, it is submitted that the accused did not recommend to the Government of Malaysia the F-5 aircrafts. It is also contended that as a giver of bribe Haji Ibrahim (PW10) is an accomplice, and it is unsafe to accept his evidence, and the court should view his evidence with suspicion because he is an untruthful witness, notwithstanding the provision of section 18 of the Prevention of Corruption Act.

As regards the amended second, third and fourth charges, the defence concedes that the court has no alternative but to call the accused to enter his defence. According to defence counsel, in essence, the defence is that the accused obtained the money on the instruction of Datuk Mohamed Taib and that the accused carried out the instruction because he was threatened and blackmailed by Datuk Mohamed Taib. It is further contended, whatever monies he received through his Executive Officer Chan (PW5) they were handed over to Datuk Mohamed Taib.

Having regard to the nature of the defence, I think the learned Deputy Public Prosecutor is justified in describing it as a defence of confession and avoidance.

In his testimony, the accused says that the first time Datuk Mohamed Taib (PW4) asked him to get money from the Syarikat was in the middle of February 1972. At that time, PW4 was a Group Captain like himself, and was the Air Commander in charge of all operational bases in Malaysia, whilst he, the accused, was the Director of Supply and Finance, Air Staff Division, MINDEF. PW4's office was at the old complex of MINDEF whilst his own office was at the new complex MINDEF about 200 yards away. On or about February 14 or February 15, 1972 at about 9.00 a.m., PW4 came to his office and asked him to take a walk with him to his office at the old MINDEF complex. Whilst walking, PW4 asked him how much commission Syarikat Bumiputra was getting for the F-5 aircraft sales. When he replied that he did not know, PW4 said, "these people were getting 'buta money' for nothing and they should be screwed for at least 1 percent". He then asked PW4 whether he had gone mad, and by that time he, the accused, was already annoyed with PW4. He wanted to turn back to his office, but PW4 insisted that he should go to his office as he had a very important thing to say. At PW4's office, PW4 told him that he had to do it; and if he refused, he would be reported to the Chief of the Armed Forces Staff for organising a private mess code-named "Sky" at Fook Chuan Mansion, Kuala Lumpur. PW4 said he knew it was the place where the accused and others gathered and did all sorts of things. He also mentioned names of top Government officials who frequented the place. In short, the accused alleges that on or about February 14 or February 15, 1972 Datuk Mohamed Taib requested him to get 1 percent commission from Syarikat Bumiputra in respect of the F-5 aircraft sales; and if he refused to do it, he would be threatened with a court-martial for organising the "Sky", and he would also expose those involved in the private mess. The accused further testifies that on the same day he went to see Datuk Sulaiman (PW1), the then Chief of Air Staff, and told him about PW4's threat and blackmail. As the reputation of the Air Force would be badly damaged and his wife was then sickly, Datuk Sulaiman agreed that the accused should carry out the request made by PW4. Before leaving, Datuk Sulaiman made him to swear not to tell anybody under any circumstances of the fact that he had agreed for accused to do the soliciting as requested by PW4. The next morning, he telephoned Haji Ibrahim (PW10) to come to his house at Old Klang Road. At that meeting, the accused admitted soliciting 1 percent commission from the Syarikat. He told Haji Ibrahim that he had been asked by someone to "screw" 1 percent from the Syarikat, and that that person had the power to stop the F-5 deal even though the Government had decided to buy the planes. After repeated insistence from Haji Ibrahim, he mentioned the name of Datuk Mohamed Taib as the person who wanted the 1 percent. Three or four days later, Haji Ibrahim came once again to his house and informed him that the Syarikat's board of directors had agreed to give 1 percent commission. At the request of Datuk Mohamed Taib, the accused managed to get the assistance of his Executive Officer Chan (PW5), to establish a Swiss bank account for collection of the bribe. The first payment of $5,000 was handed to him on February 20, 1973. The second payment of $3,000 was made in April 1973; the third payment of $3,000 in July 1973; and the fourth payment of $40,000 in August 1973. These monies were handed to him by Mr. Chan (PW5) and he, in turn, handed them to Datuk Mohamed Taib. As regards the private mess at Fook Chuan Mansion, the accused testifies that he was more or less compelled by Encik Rustam Hadi, who was then the Deputy Secretary General of the MINDEF, to organize it, and Datuk Sulaiman by implication also ordered him to do it.

I have considered the evidence adduced by the defence very carefully. Under section 14 of the Prevention of Corruption Act, it is provided that, where in any proceedings against a person for an offence under section 3 or 4, it is proved that any gratification

has been paid or given to or received by a person in the employment of any public body, the gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved. Notwithstanding this provision, it is clear law that all the defence need do in this case is to raise a reasonable doubt in the prosecution case on the balance of probabilities in the evidence. Having considered all the evidence before me in its entirety, I am of the view that the defence has not raised a reasonable doubt in the prosecution case in all the four charges as amended, and I have come to this conclusion on the following grounds.

Firstly, as regards the amended first charge, the accused in his defence in effect admits that on February 15 or February 16, 1972, he solicited 1 percent commission due to Syarikat Bumiputra from Northrop Corporation from Haji Ibrahim, the managing director of the Syarikat. But he says it was done at the request and on behalf of Datuk Mohamed Taib. The accused also admits that three or four days later, i.e. between February 18 and February 20, 1972, he agreed to accept the 1 percent commission after the Syarikat's board of directors had acceded to the request. Thus, the accused in effect admits having agreed to accept the 1 percent gratification as alleged in the amended first charge, although he contends that this took place between February 18 and February 20, 1972 and *not* between November 24 and November 28, 1971 as alleged. He also contends the agreement to accept took place at his Old Klang Road house, and *not* at Merlin Hotel as alleged in the first amended charge. Although the date and venue of the agreement to accept the 1 percent gratification may not appear very important, it is my finding that Haji Ibrahim is telling the truth when he says that the decision of the board of directors was conveyed to the accused and accepted by the accused at the end of November 1971 at Merlin Hotel in the presence of Raja Zulkifli, the then chairman of the board of directors of the Syarikat who, incidentally, was made available to the defence. The date between November 24 and November 28, 1971 is more consistent with truth when tested with other evidence. For instance, from the evidence of Mr. Uhrig (PW9) and Haji Ibrahim, it is not seriously challenged that the Syarikat was appointed as agent for Northrop Corporation as sales representative in Malaysia in the middle of November 1971. The Sales Representative Agreement (Exhibit P7B), although prepared in the United States and dated November 8, 1971, was in fact executed in Bangkok between November 16 and November 19, 1971 by Haji Ibrahim and Mr. Gonzales. Since this agency appears to be the biggest and the richest business venture the Syarikat ever had, it would not be unnatural for Haji Ibrahim to have approached the accused on his return from Bangkok in November 1971. There seems to be no conceivable reason why Haji Ibrahim should wait for the accused to contact him till February 1972. After all, they knew each other since 1970; and it can reasonably be inferred that after successfully getting the agency, Haji Ibrahim must be very anxious to get the assistance of the accused to sell the F-5 planes to the Government. Under the circumstances, the soliciting and agreement to accept 1 percent commission must have taken place between November 24 and November 28, 1971 and not in February 1972 as alleged by the defence. In this connection, I must reject the accused's testimony that the meeting in November 1971 was at his house and that no soliciting took place. The question is: Why must the defence insist that the soliciting took place in February 1972? In my view, this is a clever attempt by the accused to connect the soliciting with the private mess at Fook Chuan Mansion, which was established only on January 1, 1972. From the Membership Register Book (Exhibit D48) and the evidence of the accused and Datuk Sulaiman, I have no reason to doubt the existence of the private mess at Fook Chuan Mansion. But the question is: Has the club anything to do with the present case as alleged by the accused? The private mess, which is supposed to be the subject-matter of the alleged threat by Datuk Mohamed Taib, was not even in existence when the soliciting took place in November 1971. As such, the story of the accused regarding the alleged threat and blackmail must be rejected as sheer fabrication of evidence. Further, even Exhibit P28, which is Haji Ibrahim's letter to Mr. Uhrig dated November 25, 1971, is consistent with the soliciting having taken place in November 1971 and not February 1972.

Secondly, although mere omission in a police statement is not a contradiction, it is pertinent to note that there is no mention at all in the accused's police statement (Exhibit P45) about any threat or court-martial or blackmail to disclose the activities of the private mess by Datuk Mohamed Taib. On the contrary, there is material contradiction between the accused's police statement and his testimony in court regarding the blackmail incident. In the police statement, the accused said that it was some time in the middle of April or May 1972 that Datuk Mohamed Taib called him to his office, and it was at Datuk Mohamed Taib's office that the remark of the Syarikat getting 'buta money' was made. Whereas, in his evidence, the accused testifies the incident took place in February 1972, and it was while they were walking that Datuk Mohamed Taib mentioned about 'buta money'. As stated earlier on, there is no mention of any threat or blackmail in the police statement. Further, in the police statement, the accused gave the impression that he responded timidly to PW4's request, whereas in his testimony he says he was annoyed when PW4 first made the suggestion and he only softened up after PW4 had threatened and blackmailed him. Thus, the accused gave two versions of the alleged request by Datuk Mohamed Taib for him to solicit the 1 percent commission.

Thirdly, it is important to note that Datuk Sulaiman, the only other person who could have substantiated the accused's story, does not support the allegation of threat and blackmail by Datuk Mohamed Taib. When Datuk Sulaiman was called by the defence for further cross-examination, he testified that the accused certainly had never told him of any threat by Datuk Mohamed Taib. According to him, if the accused had done so, he would certainly have taken action, for he would not run an organization where there was a threat. He also said that it was untrue that the accused had told him about the threat by

Datuk Mohamed Taib. To quote his own words, "it is unthinkable". In re-examination, Datuk Sulaiman also said that it was fantastic to suggest that the accused took oath in front of him not to reveal the fact that he had sanctioned the accused to accede to the alleged threat and blackmail by Datuk Mohamed Taib. In his final submission, defence counsel has conceded that the answers given by this particular witness are logical, reasonable and fair. I am in complete agreement with the learned defence counsel as to the veracity and demeanour of Datuk Sulaiman. I find him to be a witness of truth and, as such, I must reject the allegation made by the accused against Datuk Mohamed Taib. There is no dispute by Datuk Sulaiman regarding the existence of the private mess at Fook Chuan Mansion, but it has nothing to do with the present case, and there is no truth whatsoever in the alleged involvement of Datuk Mohamed Taib in the present case.

Fourthly, in his submission of no case to answer, learned defence counsel has argued, if the accused had solicited the 1 percent for himself, why was he not interested in the money? He argues that one would have expected him to pester Haji Ibrahim for the big balance of 1 percent commission still unpaid. But the evidence clearly shows that the accused was in fact interested in the money until about January 5, 1975, when, according to Haji Ibrahim's evidence, the accused came to the Syarikat's office and enquired why the deposit into S.H. Tan's Swiss account had been stopped. In fact, there were two occasions after his retirement when the accused was more than interested about the 1 percent commission. Although I have found the accused not guilty on the fifth charge on technical ground, it is my finding of fact that he did in fact receive from Chan a sum of $43,800 on March 24, 1974 at his Old Klang Road house, i.e. more than six months after his retirement. From the evidence, this money came from S.H. Tan's account in Zurich through the Singapore bank and was handed to him personally by Chan (PW5). The second occasion was when the accused went to the Syarikat's office on January 5, 1975, which was a Sunday. The accused's police statement confirms that he went to the Syarikat's office in 1975, but it was some time in the middle of 1975. Having regard to the whole evidence, I do not accept the accused's statement that he went there at the request of Haji Ibrahim because he wanted to offer a directorship of the Syarikat to the accused, and Haji Ibrahim also mentioned about more money to come which amounted to U.S.$95,000. Defence counsel seems to suggest that Haji Ibrahim is a dishonest person because the actual money due was more than U.S.$133,000. In my view, there is no conceivable reason why Haji Ibrahim should want to offer a directorship to the accused. In the first place, this story was never put to Haji Ibrahim when he was cross-examined. If the intention of Haji Ibrahim was to misappropriate for himself the balance due to S.H. Tan's account, there is no reason why he must share it with the accused. As it turns out, the balance of the 1 percent due to S.H. Tan's account which was diverted by the Syarikat to the Bank of Montreal in Los Angeles was all along within the knowledge of the board of directors and, as such, I cannot agree that Haji Ibrahim is a dishonest person. From the evidence, all loans taken from the U.S. account either by Mr. T.A. Lewis or by Haji Ibrahim have been repaid in full to the Syarikat. On this issue, I accept Haji Ibrahim's evidence that the accused went to the office of the Syarikat for the purpose of enquiring why money had stopped flowing into S.H. Tan's Swiss account, and when shown the verification of account letter from Northrop (see Exhibit P7L1 or Exhibit P7L1-0) the accused must have been in a dilemma. The verification letter should be signed by S.H. Tan. The evidence clearly shows neither Haji Ibrahim nor any director of the Syarikat, nor any official of Northrop Corporation knows S.H. Tan personally. Only the accused could have traced S.H. Tan through the elder brother Chan (PW5). It is not unreasonable to infer, a businessman like S.H. Tan would certainly refuse to sign the document, knowing that the money to be verified had in fact gone into the accused's pocket, except for the sum of M$2,000 which S.H. Tan had deducted as expenses. In my view, this explains neatly why the accused never came to see Haji Ibrahim again, although he had promised to do so. Why did he not sign the verification letter on behalf of S.H. Tan? What was he afraid of? If Datuk Mohamed Taib was the real culprit, why did he not take the verification letter to him? The irresistible inference is that the accused had a guilty mind because he knew he had taken all the money as stated in the second to fifth charges and was, therefore, not prepared to verify the payments already made by Northrop.

Fifthly, in the accused's police statement (Exhibit P45), he alleges that he solicited the 1 percent commission on behalf of Datuk Mohamed Taib. The statement also alleges that the accused told Haji Ibrahim, it was Air Commodore Mohamed Taib who wanted the 1 percent commission. However, this story was never put to Haji Ibrahim in cross-examination. In fact, Haji Ibrahim clearly testifies that the accused told him the commission was for him and his colleagues, i.e. for him and more than one of his colleagues. To his Executive Officer Chan (PW5), the accused also said the overseas bank account was for making collection for "top people". If the 1 percent commission was really for Datuk Mohamed Taib, then why refer to him as "colleagues" and "top people"? In the circumstances, I must also reject that portion of the police statement and as well as the accused's allegation as devoid of any truth.

Sixthly, regarding the amended second, third and fourth charges, although the accused in his evidence admits receiving four payments from Mr. Chan, the dates and the amount of money received are different from those stated in the charges. According to the accused's testimony, the first payment was received on February 20, 1973, which is consistent with the amended second charge although the amount received according to him was $5,000 and not $8,500. The second payment was received in April 1973 and the amount was $3,000. This particular payment is not in the prosecution evidence. According to the accused, the third payment was received in July 1973, which is consistent with the amended third charge, but the amount received was $3,000 and not $5,350. The fourth and final payment was received by the accused in August 1973, which is consistent with the amended

fourth charge, but the amount received according to him was $40,000 and not $44,000 as alleged in the charge. The accused denies having received $43,800 on March 24, 1974, which is the subject-matter of the fifth charge, for which he has been acquitted on technical ground. As I have stated elsewhere in this judgment, there is ample evidence that the accused did in fact receive through Chan the sum of $43,800 on March 24, 1974. In his submission of no case to answer, learned defence counsel never mentioned about the alleged receipt by the accused in April 1973, and this alleged payment by Chan was never put to any of the prosecution witnesses, particularly Chan (PW5), S.H. Tan (PW8) and Chua Choon Kim (PW7), the Assistant Manager of Chase Manhatten Bank Singapore. It should be noted that the accused took the option to retire at the age of 50 years on September 10, 1973. I am therefore satisfied that the accused received the fourth payment on March 24, 1974, i.e. about six months after his retirement. This evidence does not support the defence counsel's contention that, after the accused's retirement, he showed no interest in the 1 percent commission. Although the accused was acquitted without his defence being called on the amended fifth charge, I must stress once again that it was on technical ground and not because there was no evidence that he in fact received through Chan the sum of $43,800 on March 24, 1974.

Finally, the evidence shows that the accused was working directly under Datuk Mohamed Taib from January 1, 1973 until he retired on September 10, 1973 — a period of about nine months. At that time, Datuk Mohamed Taib was the acting Chief of Air Staff during the absence of Datuk Sulaiman. The defence counsel was particularly unhappy with the evidence of Datuk Mohamed Taib because the witness had stated that during that period he met the accused officially only on three occasions. In my view, Datuk Mohamed Taib had given cogent explanation why this was so. According to him, the accused was always late in coming to office and, in fact, he found it more convenient to deal with the accused's deputy, for the simple reason that the accused was seldom to be found in the office. There is evidence that Datuk Mohamed Taib is a strict disciplinarian and is determined to improve the RMAF. He cannot tolerate acts of indiscipline and inefficiency in the RMAF. This is no doubt due to his military upbringing since the age of fourteen years when he joined the Military College at Port Dickson, and later went to Eaton Hall and was eventually commissioned at the Royal Military Academy Sandhurst. If he were corrupt, he would certainly have planned his strategy with military precision. It is inconceivable that, after successfully blackmailing the accused to get the bribe for him, he would allow the accused to retire at the optional age of 50 years. The evidence shows that he did nothing to stop the accused from retirement, when there was still a balance of more than US$130,000 to be collected from the 1 percent commission. As I have stated earlier on, except for the accused and the Executive Officer Chan (PW5), no other person in this case knew S.H. Tan. To the Syarikat and Northrop Corporation, S.H. Tan was simply a name without a face. To Datuk Mohamed Taib, even the name 'S.H. Tan' was never mentioned to him. If Datuk Mohamed Taib were the real culprit in this case, he would not have taken any action against the accused for coming late to office or for being absent from office during working hours. On the contrary, he imposed strict military discipline to all his officers, including the accused. I would like to stress once again that I find not an iota of evidence to support the allegation that Datuk Mohamed Taib is a blackmailer or is the actual recipient of the bribe in this case. It should be noted that, unlike the accused, Datuk Mohamed Taib was not even a member of the three-man evaluation team or the five-man negotiation team. In short, he had nothing to do whatsoever with the selection of aircrafts for the RMAF. At the material time, he was a Group Captain and a commander in charge of operational air bases in Malaysia. His opportunity to influence the Government in the choice of aircrafts was nil.

In this case, it is true that Haji Ibrahim as the giver of the bribe is an accomplice, and his testimony must be considered carefully and with suspicion, although by virtue of section 18 the fact that he is an accomplice does not, *ipso facto,* render him unworthy of credit. But having regard to the nature of the defence in this case and the fact that it was the accused who initiated the request for the 1 percent commission, Haji Ibrahim should not in my opinion be classified as an accomplice of the first degree. In this case, the accused admits soliciting and agreeing to accept the 1 percent commission. He also admits accepting money corruptly, but all these according to him were done not for himself but for Datuk Mohamed Taib. In any event, Haji Ibrahim's evidence is corroborated by documentary and circumstantial evidence.

For the above reasons, I find the accused guilty on all four charges as amended and I accordingly record a conviction.

In assessing sentence, I take into consideration the plea in mitigation made by counsel for the defence and also the submission made by the Deputy Public Prosecutor. In particular, I take into consideration that the accused has four children, three of whom are still schooling, and that he has given valuable service to RMAF, for which he was awarded the Ahli Mangku Negara. I also take into consideration that he is already 54 years old and is suffering from asthma. As against this, I consider it my duty to treat the offences committed by the accused as very serious. As a very senior officer in the RMAF, it is scandalous that he should corruptly agree to accept from a company approximately US$177,473 as a reward for recommending to the Government to purchase a particular type of aircrafts. In my view, the four offences for which he has been found guilty and convicted cannot properly be dealt with under section 294(1) of the Criminal Procedure Code as suggested by the learned defence counsel. Although the accused is a first offender, the offences committed are of such serious nature that it would be against the public interest to put him on a bond of good behaviour.

The learned Deputy Public Prosecutor has urged the court to impose a heavy sentence having regard to the nature of the defence. It is true that the defence has scandalised or has attempted to scandalise many prominent civil servants, particularly Datuk

Mohamed Taib, who is currently the Chief of Air Staff of RMAF. It is my considered opinion that in a criminal trial an accused person is entitled to put up any type of defence that he thinks necessary and justified in order to raise a reasonable doubt in the prosecution case, and the fact that such defence has not succeeded should not be taken against him in assessing sentence. In the present case, although the accused had agreed to accept US$177,473, which is equivalent to about half a million dollars Malaysian currency, he in fact received less than M$100,000. Having regard to all the circumstances in this case, I impose a sentence of three years' imprisonment on the first charge, twelve months' imprisonment on the second charge, and another twelve months' imprisonment on the third charge, and two years' imprisonment on the fourth charge. Since all four offences are under section 4(a) of the Prevention of Corruption Act, 1961, and also the second, third and fourth charges were committed in consequence of the agreement to accept the gratification referred to in the first charge, it is fair and just that the sentence imposed on the three charges should run concurrently with the first charge. To my mind, the sentence imposed is fair and adequate to serve public interest. In addition, I also order that the accused to pay $58,350, which represents the amount he actually received as contained in the second, third and fourth charges, as a penalty to the Malaysian Government under section 13 of the Prevention of Corruption Act within six months from today. If I had erred at all in the sentence, it is on the side of leniency.

The accused appealed to the Federal Court.

FEDERAL COURT.

Suleiman Alias for the appellant.

Faidz bin Mohd. Darus, Senior Federal Counsel, (*Ghazali bin Mohamed Yusoff,* Deputy Public Prosecutor with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The appellant was tried in the High Court at Kuala Lumpur on one charge of soliciting for an illegal gratification and four charges of accepting for himself various sums by way of bribes while a Group Captain of the Royal Malaysian Air Force (RMAF). He was convicted on the charge of soliciting and on three of the four charges of receiving bribes. On the fourth charge, he was acquitted without being called to enter on his defence because the High Court accepted the submission of his counsel that at the time mentioned in this particular charge he had resigned his commission and was no longer an officer in the RMAF or an agent of the Government of Malaysia. From that acquittal, no appeal has been lodged and we say no more about it. But the appellant has appealed against his conviction and the concurrent sentences of imprisonment of 3 years, 12 months, 12 months and 2 years respectively. An order was also made by the High Court under section 13 of the Prevention of Corruption Act for the repayment of the sum of $58,350 representing the total of the sums received by him under the three charges. No order was made for the refund of the other $43,800 received by him under the charge of which he was acquitted.

In 1971, when a decision was reached to seek a replacement for the obsolete Sabre fighter jets in service with the RMAF an evaluation team of three was appointed. The accused, then a Wing Commander and the Director of Supplies, Air Staff Division, was appointed to this team. It visited various countries. From its studies of the various fighter aircrafts in use, it recommended the French Mirage, but the recommendation was rejected on financial grounds. Datuk Sulaiman Sujak, Chief of Air Staff RMAF, at the request of the Government, then submitted an aide-memoire on the Northrop F-5 aircraft. Approval was given for the purchase of the Northrop F-5. A negotiations team of five, of whom the accused was one, went to the United States. On its return, it made certain recommendations which the Government accepted. On June 30, 1972 an agreement was entered into between the U.S. and Malaysian Governments for the purchase of 16 Northrop F-5E planes.

In the meantime, a Company Syarikat Bumiputra Sdn. Bhd. (the Company) succeeded in getting itself appointed the Sales Representatives for Northrop, through the introduction of a certain T.A. Lewis of Bangkok. The Company represented itself as "an established and recognised sales trading representative in Malaysia for sales of equipment to the Government of Malaysia" and agreed "actively under the Northrop's direction to pursue sales of Northrop F-5 type aircraft on behalf of Northrop to the Government of Malaysia." Following the appointment of the Company at 3% of the total sale price, Haji Ibrahim bin Sheikh Yahya, the Company's managing director, the person who conducted the affairs of the Company at all relevant times, on November 24, 1971, that is, immediately after securing the Company's appointment, visited the appellant at the latter's office in the Ministry of Defence (MINDEF). This was well before the decision to purchase the Northrop F-5E. The upshot of this meeting and subsequent encounters was an agreement to pay the appellant a third of the commission received. A third had been promised to this T.A. Lewis, so that in the result, the Company had only 1%. So that the payment could be made direct to those who claimed the money, the agreement in writing for the appointment of the Company was amended and by clause 6, it was provided that the commission on 3% hitherto payable only to the Company was to be distributed as to 1% to a Mr. S.H. Tan in his account No. PO 318-727 with the Swiss Bank Corporation of Zurich, Switzerland. The information received by Northrop regarding S.H. Tan could, as the High Court found and we entirely agree, only come from the appellant through Haji Ibrahim.

S.H. Tan or Tan Soo Huah is a businessman in Kuala Lumpur. He is the brother of a Chan Soo Weng who was at the relevant time an executive officer in the Supply Branch, Air Staff Division, MINDEF, directly working under the appellant. Chan Soo Weng's testimony was to the effect that the appellant asked him to obtain the use of an overseas account and he approached Tan Soo Huah, who then opened this Swiss account. Northrop made four payments in respect of this 1% into the Swiss account of S.H. Tan, S.H. Tan drew out the money on each occasion and gave it to Chan Soo Weng who passed it on to the appellant, after making a small deduction

for expenses. A total of US$43,987 was paid in and taken out. This sum represented the various amounts in the charges.

The prosecution introduced in evidence after a trial within a trial as to their voluntariness, two statements recorded from the appellant under the provisions of section 15 of the Act. The appellant did not deny the receipt of the money but contended that it was for Group Captain Mohd. Taib of the RMAF who had asked him to demand a share of the commission from the Company and that he had throughout acted as the agent of Group Captain Mohd. Taib and that he had paid over to him whatever money he had received.

In consequence of this line of defence, the prosecution called Group Captain Mohd. Taib to give evidence. He denied everything that the appellant accused him of. He had nothing to do with the selection or rejection of the aircraft. He was not a member either of the evaluation or the negotiations teams. He as a flying man had very little to do with the appellant in the course of his duties except that when he was acting as Chief of the Air Staff and had found the appellant dilatory in his work, he did indicate to him that he should resign.

In his defence, the appellant continued to put all the blame on Group Captain Mohd. Taib.

At his appeal before us, his counsel based his entire argument on an attack on the learned judge's acceptance of Group Captain Mohd. Taib's evidence. He acknowledged, when asked, that he was appealing on facts which the learned judge had found having heard and seen the witnesses in the witness box and after examining the documentary evidence. But he stoutly maintained that this evidence was untrue because it just was not reasonable. We are however satisfied that he had made the same representations to the learned judge, who had considered them and who had on the totality of the evidence combined with his personal assessment of the witness's reliability from seeing him in the witness box come to the findings he did make. Under such circumstances, where the findings depend on an assessment of the credibility and reliability of a witness, it is not the practice of this court sitting on appeal to refuse to accept them.

But in this particular case, our reluctance to differ from the learned judge is all the firmer because even if we accept (which we do not) the contention of the appellant that Group Captain Mohd. Taib was an untruthful witness and that it was true and a fact that he had solicited and accepted the illegal gratification as an agent for him, he is just as guilty since section 4 of the Act provides that the offence is committed by someone who solicits or receives or agrees to receive the illegal gratification for another. That is clear beyond argument from the wording of this section 4:

"4. If —

(a) any agent corruptly accepts or obtains, or agrees *to accept* or attempts to obtain, from any person, *for himself or for any other person,* any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;"

It might be that the charges would have to be amended if the court accepted the defence version; but the defence at the trial court and on appeal never seriously challenged the guilt of the appellant. However, in the final analysis, no reason exists to disturb the High Court's findings of fact or the conviction.

As for the sentences, we agreed with the learned judge's opinion that the sentences imposed by him erred on the side of leniency. We do not however propose to disturb them.

The appeal was dismissed.

Appeal dismissed.

Solicitors: *Suleiman Alias & Nava.*

GILLESPIE BROS. & CO. v. NGUI MUI KHIN & ANOR.

[O.C.J. (Syed Othman F.J.) September 3, 1978]
[Johore Bahru — Civil Suit No. 174 of 1976]

Contract — Agreement to finance company in course of business in relation to bills and orders — Guarantee for payment of outstanding sums — Whether transaction a money-lending transaction — Moneylenders Ordinance, 1951.

The plaintiffs a United Kingdom company had agreed to finance a company in Singapore in the course of its business in respect of bills and orders. The defendants agreed to guarantee payment of outstanding amounts. The plaintiffs sued the defendants for the outstanding amount and obtained summary judgment. The defendants appealed and on the appeal it was argued that there was a triable issue as to whether the transactions were moneylending transactions.

Held: the Moneylenders Ordinance relates only to pure money transactions. It did not apply to the transactions in this case, which was in essence the grant of credit facilities subject to payment of interest on the price of goods.

Case referred to:-

(1) *Victor Kee Yong Poey* v. *Diners Club Malaya Sdn. Bhd.* [1976] 2 M.L.J. 30.

CIVIL SUIT.

T.S. Chung for the appellants.

N. Jegathesan for the respondents.

Cur. Adv. Vult.

Syed Othman F.J.: The only issue which has been agreed upon by the parties to be determined in this appeal is whether the transaction entered into between the parties is a moneylending transaction.

The appeal is against the decision of the Senior Assistant Registrar on January 11, 1978 when she allowed the plaintiffs to sign final judgment against the defendants for the sum of $84,560.76 together with interest at the rate of 8.75% from June 3, 1975 to the date of judgment and further interest on the decretal sum at the rate of 6% from the date of judgment to the date of realisation. She also ordered the defendants to pay costs.

It is common ground the plaintiffs are not registered moneylenders under the Moneylenders Ordinance, 1951 and that all the transactions were outside the country.